Supreme Court, U.S.
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No. 95-134

In The

Supreme Court of the United States

October Term, 1995

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

vs.

MARY E. ISBELL, DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER and THE MARICOPA COUNTY SUPERIOR COURT,

Respondents.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENTS MARY E. ISBELL, DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL AND JOSEPH ISBELL

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QUESTIONS PRESENTED

At issue is the interpretation of 23 U.S.C. § 409, which provides (with emphasis added):

> **§ 409. Discovery and admission as evidence of certain reports and surveys.**
>
> Notwithstanding any other provision of law, **reports, surveys, schedules, lists or data** ***compiled for the purpose of identifying, evaluating, or planning*** the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or ***for the purpose of developing*** any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

1. Does this Statute shield operative facts concerning railroad crossings simply because such facts are later incorporated into "reports, surveys, schedules, lists or data compiled" for purposes mentioned in the Statute?

2. Where the State or Railroad is obligated by statute or common law to prepare compilations of data independent of federal funding projects, are such compilations of data exempt

from discovery and admission in evidence because they may also be used to obtain federal funding?

3. Are compilations of data generated *after* a grade crossing has been "identified" or "evaluated" and upgrades "planned" or "developed" protected by the Statute?

4, Does 23 U.S.C. § 409 prohibit the discovery of facts concerning the grade crossing review process (*e.g.*, that such a process exists, the dates on which crossings were reviewed, the names of the persons present at such reviews, etc.)?

5. Where a law enforcement officer or other person gives notice to the State or Railroad of a hazardous condition at a grade crossing, is such notice shielded from discovery or admision into evidence by 23 U.S.C. § 409?

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Appendix A — Excerpts of Discovery Requests at Issue . 1a

COUNTER-STATEMENT OF THE CASE

A. Factual and Procedural Overview

Richard Isbell was killed on April 10, 1990 when the tractor trailer he was driving collided with a Southern Pacific train at the Chandler Heights grade crossing in Chandler, Arizona. The grade crossing at which the collision occurred had been placed by the State on an array for safety improvement by the installation of automatic gates in 1983. In 1985, Maricopa County petitioned the Arizona Corporation Commission for authority to install the gates. That authority was granted "in the interest of public necessity" in January, 1986. Four years later, the automatic gates were still not installed and Mr. Isbell was killed at the crossing.

Mr. Isbell's widow and children brought suit against Southern Pacific ("Railroad"), the State of Arizona ("State"), Maricopa County and the City of Chandler, alleging that their joint and separate negligence contributed to Mr. Isbell's death. Early in the litigation, the Isbells sought to depose a State employee and served certain written interrogatories upon the State and Railroad.[1] Relying upon 23 U.S.C. § 409, the State refused to allow its employee to answer substantive questions at deposition and both the State and Railroad refused to respond to the interrogatories.

The State moved for a protective order and the Isbells cross-moved the trial court to compel discovery. The trial court granted the motion to compel. The State and Railroad then filed a Petition for Special Action.[2] The Arizona Court of Appeals granted

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1. For the Court's convenience, the discovery requests at issue are appended hereto as Appendix 1.

2. In Arizona, interlocutory relief is obtained through "special action" which has replaced writs of certiorari, mandamus and prohibition. Ariz. R. P. Spec. Act. 1.

jurisdiction and reversed the trial court. The Isbells then petitioned the Arizona Supreme Court for review. The Arizona Supreme Court granted review, vacated the decision of the intermediate appellate court, affirmed the trial court ruling, and remanded the case to the trial court for further proceedings.[3]

B. The Railroad's Position

The Railroad reads 23 U.S.C. § 409 as shielding from discovery "all information" and "all facts" in any way related to a grade crossing that could be improved. This reading would bar the discovery or admission of the prior accident history of the grade crossing and prevent the jury from knowing whether there had been one similar accident before Mr. Isbell's death or twenty, thereby precluding the jury from evaluating the nature and extent of the dangerousness of this grade crossing.

Similarly, under the Railroad's interpretation of the Statute, even the police report and other investigation of the very incident in question would be undiscoverable and inadmissible because that collision played a role in the ultimate upgrade of the crossing (within months of Mr. Isbell's death) and could play a role in determining whether future upgrades were necessary at this crossing or others. In the same manner, testimony by the Railroad and governmental investigators—who were at the scene shortly after the crash, interviewing the witnesses, taking measurements and photographs—would be prohibited. The same interpretation of 23 U.S.C. § 409 would also preclude the discovery and admission of even eyewitness testimony because their observations could find their way into reports and surveys of

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3. Throughout the litigation in the State courts, the Isbells raised the issue of whether 23 U.S.C. § 409 applies to entities other than the states. The Isbells also questioned whether documents relating to crossings *other than* the precise crossing at which Mr. Isbell was killed were within the ambit of 23 U.S.C. § 409. The Arizona Supreme Court did not reach these issues.

railroad crossings which could be used to identify, evaluate or plan a grade crossing improvement.

While such absurd results would flow naturally from the Railroad's interpretation of 23 U.S.C. § 409, they do not flow from the actual text of 23 U.S.C. § 409 or from the interpretation of the Statute by the Arizona Supreme Court.

C. The Arizona Supreme Court's Decision

The Arizona Supreme Court rejected the Railroad's broad interpretation of the Statute. The court held that 23 U.S.C. § 409 creates an evidentiary privilege and that certain classes of data compilations are exempt from discovery and admission at trial. The Arizona Supreme Court's interpretation is in line with traditional canons of statutory interpretation which teach that evidentiary privileges are to be construed narrowly to foster the truth-seeking mission of the judicial system.

The Arizona Court did not apply its interpretation of 23 U.S.C. § 409 to the actual interrogatories at issue. The court wrote:

> We . . . reject a broad interpretation of 23 U.S.C. § 409 and agree with the view of those courts giving § 409 its plain meaning. It follows, therefore, that the trial judge did not err in denying the state's motion for protective order and granting Isbell's cross-motion for order compelling discovery from the state and from Southern Pacific. *The record here is insufficient for us to apply our understanding of this statute to the specific material which were the subject of the motions.* We therefore vacate the opinion of

> the court of appeals, affirm the order of the trial court, and remand for further proceedings consistent with this opinion.

890 P.2d at 615 (emphasis added).

As of this date, the Railroad has yet to respond to the outstanding discovery requests. Depositions of relevant witnesses have not yet been set. Further discovery requests are anticipated. Petitioner (and the State) possess many types of documentary evidence which may or may not be held discoverable or admissible under the Arizona Supreme Court's interpretation of 23 U.S.C. § 409. Much discovery remains to be done before the trial of this matter and before an actual determination is made of the scope of the documents, facts and witness testimony that would be admissible at trial.

D. The Isbells' position

The following hypothetical[4] will illustrate the issues raised by the Statute: in order to obtain federal funding, a state department of transportation ("DOT") conducts a field review of the Chandler Heights crossing. At that review, state employees take various measurements relating to the crossing and reach various conclusions regarding the crossing's safety. After the review, the state employee prepares a report, containing both factual findings and opinions. Later, in determining whether the Chandler Heights crossing should be upgraded, the DOT reviews the following documents: (1) the field review, (2) accident reports relating to the crossing prepared by city police departments, and (3) a letter from a concerned citizen

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4. A hypothetical example is necessary because the Arizona Supreme Court decision is interlocutory. The actual scope of the discovery to be allowed is as yet undecided.

complaining that the crossing is dangerous. Based upon that review, the DOT determines that the crossing should be upgraded and orders the railroad to upgrade the crossing.

Four years after the state determines that the public would be served by the upgrade, the crossing is still not improved. A man is killed when his tractor trailer hits the side of a train at the Chandler Heights crossing. During the litigation, the plaintiffs propound discovery to which the state and railroad object. The question is presented: what did Congress intend to shield from discovery when it passed 23 U.S.C. § 409?

The Arizona Supreme Court held, and the Plaintiffs concede, that the completed field review form is not discoverable under 23 U.S.C. § 409. A fair reading of the Arizona Supreme Court decision is that the following types of information and/or documents are not shielded by 23 U.S.C. § 409: (1) underlying facts found in the field review report, such as the measurements relating to the crossing, (2) police reports and other such documents regarding the accident history of the crossing generated by state agencies and others under an independent duty to do so, and (3) information received from concerned citizens or law enforcement personnel. The Arizona Supreme Court decision also implies that information generated *after* the decision to upgrade has been made are not protected. Similarly, it appears that operational facts concerning the process are not protected; *i.e.*, the jury could be told that the state and railroad does review grade crossings for purposes of safety enhancement. The Arizona decision does not reach the issue of whether information concerning crossings other than the crossing at issue in the collision is protected.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS INTERLOCUTORY.

Because the parties are in the middle of discovery and the trial of this matter is yet many months away, it is too early to determine just which documents, facts and witnesses will be affected by the Arizona decision. Absent specific rulings on the discoverability or admissibility of particular evidence, this Court's review would be premature.

II.

THE RECORD IS INSUFFICIENT FOR REVIEW.

As noted above, the Arizona Supreme Court did not examine the specific discovery requests and did not rule on each request individually. The Arizona decision has yet to be applied to the facts of this case.

III.

THE ISSUES ARE NOT FULLY DEVELOPED BY THE APPLICABLE CASE LAW.

Only two Circuit Courts have construed 23 U.S.C. § 409, as amended in 1991: the Seventh Circuit in *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155 (7th Cir. 1992), and the Eighth Circuit in *Lusby v. Union Pacific Railroad Co.*, 4 F.3d 639 (8th Cir. 1993) and *Robertson v. Union Pac. R.R.*, 954 F.2d 1433 (8th Cir. 1992). Each of these decisions is narrowly limited to the facts of the particular case.

The plaintiff in *Harrison* conceded that the document at

issue — a report prepared by a state agency following the crash and detailing the need to upgrade the crossing — constituted "data compiled for the purpose of identifying . . . the safety enhancement" of the crossing. 965 F.2d at 159. The plaintiff in *Harrison* waived her argument that the authors of the report should be allowed to testify "for purposes other than describing the results of the investigation." 965 F.2d at 160, n. 9.

At issue in *Robertson* was the admissibility of a "hazardousness formula"[5] and traffic counts of the subject crossing. Both the formula and the traffic count "were compiled and utilized by the [state agency] pursuant to 23 U.S.C. § 130(d) for purposes of monitoring and improving highway railroad safety." 954 F.2d at 1435. The Eighth Circuit found that the formula, the count and a newspaper article based on the formula were inadmissible. Without analysis, the *Robertson* court rejected the plaintiff's argument that some of the evidence should be admissible because it was not collected or utilized solely for federal funding projects. The whole of the court's reasoning is contained in a footnoted sentence: "Although such information was available for other uses and purposes, the statute's mandatory language requires exclusion of such evidence at trial." 954 F.2d at 1435, n. 3.

Citing *Robertson, Lusby* precluded the admission of the state highway department's "records of vehicle count, train traffic, and earlier accidents at the crossing" and the admission of expert testimony that was based *exclusively* on such documents. 4 F.3d at 641. The court noted that these documents were used by the highway department "to comply with the federal program under § 130(d)." Relying on *Robertson,* and with a similar dearth of analysis, the *Lusby* court held that materials "do not fall outside

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5. Under this formula, the crossing at issue in *Robertson* had been identified as the most hazardous in the State of Texas. That finding was later repeated in a newspaper article.

the scope of § 409 merely because they are not compiled solely for federal reporting purposes and are available for other purposes." 4 F.3d. at 641.[6]

This Court should deny certiorari to allow the Circuit Courts to apply 23 U.S.C. § 409 to testimony and documents other than those which the parties concede fall within the letter of the statute.

IV.

THIS CASE IS DISTINGUISHABLE FROM THE AUTHORITY CITED BY PETITIONER.

Unlike the foregoing cases, the evidence at issue in this case does not fall neatly within the narrow confines of 23 U.S.C. § 409, nor have the Plaintiffs waived any of their arguments. The Plaintiffs seek to discover:

> (1) compilations of data generated *after* a grade crossing has been "identified" or "evaluated" and upgrades "planned";
>
> (2) underlying facts concerning the grade crossing review process (*e.g.*, that such a process exists, the dates on which crossings were reviewed, the names of the persons present at such reviews);

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6. Interestingly, the *Lusby* court left the door open on this issue by writing the following: "Although the expert might have been able to generate similar data himself, he nevertheless impermissibly based his opinion on [highwayt department] data." 4 F.3d at 641, internal citation omitted. Had the expert compiled the data himself or received a report from a governmental agency other than the highway departrment, the use of such a compilation would be permissible.

(3) notices given by a law enforcement officer or other person of a hazardous condition at a grade crossing, where such person is not obligated to give such notice pursuant to any statute or regulation connected with the federal funding scheme;

(4) factual observations made by persons involved in the review process (without inquiry as to any opinions or conclusions reached by such persons); and

(5) compilations of data generated by the State, Railroad and others pursuant to statutory or common law obligations *independent* of the federal funding scheme (*e.g.*, police reports).

There is no conflict between the Arizona decision and the Seventh Circuit's decision in *Harrison*.

The only potential conflict between the Arizona decision and the Eighth Circuit's decisions concerns the admission of police reports and other such documents; but even that potential conflict is not fully developed by the case law. Neither *Lusby* nor *Robertson* actually analyzes this issue; it was instead dealt with in a footnote.

It would be premature to grant certiorari in this case because there is no developed conflict between the Circuit Courts and the Arizona decision and the Circuit Courts have not yet analyzed these issues in detail.

V.

THE ARIZONA SUPREME COURT'S DECISION IS CORRECT.

Since "the [legislative] history of 23 U.S.C. § 409 is nonexistent," the language of the statute is of paramount importance.[7] A diagram of the Statute shows that it shields from discovery:

1. reports, surveys, schedules, lists or data

2. compiled for the purpose of

    a. identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of [Title 23] or

    b. developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

To be undiscoverable, the evidence at issue must meet both requirements.[8]

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7. 890 P.2d at 611, accord *Harrison*, 965 F.2d at 156, n. 3 ("The legislative history of § 409 is silent as to why Congress determined that such data should be inadmissible in judicial proceedings.").

8. The statute also requires that, to be protected, the data compilations must relate to the "occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data." The Arizona Supreme Court did not reach this issue.

A. "Reports, surveys, schedules, lists or data" are terms of art meaning something different than raw "facts."

Congress specified that "reports, surveys, schedules, lists or data" are protected. "This enumeration suggests something more than simple factual information that [a state department of transportation] has gathered." *Martinolich v. Southern Pacific Transp. Co.*, 532 So. 2d 435, 439 (La. App. 1 Cir. 1988).

In determining congressional intent, the Arizona Supreme Court referred to other sections of Title 23, especially those sections referenced in § 409. The court concluded that the words "reports, surveys, schedules, lists or data" are terms of art which refer to more than raw "facts."

The Railroad rejects that analysis and contends that the phrase "reports, surveys, schedules, lists or data compiled" should be equated with the word "fact." That argument fails because not even the word "data" is strictly synonymous with "fact."[9] Stated simply, a fact *is*, while data is gathered or *compiled*. This difference, while subtle, is important. That there

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9. *Webster's Ninth Collegiate Dictionary* defines the terms as follows:

> **data**: factual information (as measurements or statistics) used as a basis for reasoning, discussion or calculation <the [data] is plentiful and easily available — H.A. Gleason, Jr.> <comprehensive [data] on economic growth has been published — N.H. Jacoby>
>
> **fact**: 1: a thing done: as **a**: CRIME <accessory after the [fact]> **b** *obs*: FEAT **c** *archaic*: ACTION 2 *archaic*: PERFORMANCE, DOING 3: the quality of being actual: ACTUALITY <a question of [fact] hinges on evidence> 4 **a**: something that has actual existence <space travel is now a [fact]> **b**: an actual occurrence: EVENT <prove the [fact] of damage> 5: a piece of information presented as having objective reality — **in fact**: in truth: ACTUALLY

is a railroad crossing at Chandler Heights Boulevard is a "fact." An array that lists the Chandler Heights Boulevard crossing as one of several crossings for improvement is "data" compiled for purposes of obtaining federal funding.

B. Only data "compiled" for the specific purposes listed in 23 U.S.C. § 409 are exempt from discovery and admission.

To claim the privilege under 23 U.S.C. § 409, the State or Railroad must prove that the contested evidence consists of "reports, surveys, schedules, lists or data *compiled*" for a protected purpose. If the subject evidence is a compilation of data generated pursuant to 23 U.S.C. §§ 130, 144 or 152, the defendant would meet its burden. If the State or Railroad cannot show that the evidence was compiled pursuant to §§ 130, 144 or 152, the evidence *may* still be protected, but only if the State or Railroad could prove that the evidence was compiled for purposes of developing a safety program using federal funding other than under §§ 130, 144 or 152.

If the document was compiled for another purpose (as in the obvious case of police reports) and later incorporated into data compiled for protected purposes, that document is not protected by the Statute. The State and Railroad cannot shield potentially damaging reports of other agencies by the simple expedient of "compiling" them or attaching them to reports concerning highway or railroad crossing safety.

The Railroad argues against this common sense interpretation of the term "compiled" as it is used in 23 U.S.C. § 409. The Railroad's reliance on *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989) in support of its argument is misplaced because the statutes and facts in the two cases are materially different. *John Doe Agency* involved a Freedom of Information Act ("FOIA") request by a defense contractor which

was under investigation by law enforcement personnel. The contractor sought access to government documents that had been generated by an Agency before the investigation. The Agency denied the request based on the exception to the FOIA for documents "compiled for law enforcement purposes" and transferred the documents to the FBI. 493 U.S. at 149.

This Court held that the Agency documents, even though not "originally" compiled for law enforcement purposes, were entitled to protection because they were later "recompiled" for law enforcement purposes.[10] Implicitly underpinning the decision is the fact that the documents at issue had been physically removed from the Agency premises and were no longer available other than in their recompiled state at the FBI for law enforcement purposes.

The instant case is different from *John Doe Agency.* First, the FOIA request at issue in *John Doe Agency* concerned only *documents,* not underlying facts.[11] That distinction alone is dispositive.

Moreover, the nature and treatment of the documents in *John Doe Agency* and in this case is materially different. In *John Doe Agency,* once the documents were "recompiled," they were taken from the original agency and removed from public record. In this case, the documents at issue were, and remain, public records. To the extent that records of other agencies were gathered and "recompiled" into the files of the Arizona Corporation Commission, they were copied, not removed from the originating

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10. For purposes of the Opinion, this Court assumed that the documents had, in fact, been "recompiled" by law enforcement personnel *before* the FOIA request.

11. Presumably such facts would be subject to disclosure under the various rules governing criminal trials.

agency (from which they remain available). This distinction is important. In *John Doe Agency,* the original documents were removed from the Agency and "recompiled for law enforcement purposes" by the FBI and were shielded from all public access. By contrast, in this case, when the Arizona Corporation Commission made a copy of a police report and made that copy part of a compilation of documentation used to evaluate the safety of a grade crossing, the original police report remained available to the public and the Plaintiffs.

Finally, the purpose behind the protection afforded by the exception to the FOIA for documents "compiled for law enforcement purposes" is different from the purpose underlying 23 U.S.C. § 409. In the FOIA context, the documents are protected because disclosure would impact *criminal* enforcement, i.e., "could reasonably be expected to interfere with enforcement proceedings" or "would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(A) and (E). While 23 U.S.C. § 409 does not contain a statement of purpose, it is usually assumed that it was enacted to encourage candor which would facilitate more rapid improvements to highways and grade crossings. Given these different purposes, the term "compiled for law enforcement purposes" as used in 5 U.S.C. § 552(b)(7) is interpreted more broadly than the term "compiled for safety enhancement purposes" in 23 U.S.C. § 409.

C. The Statute does not prohibit the discovery of data compiled after the Arizona Corporation Commission has entered its order that a grade crossing be improved.

23 U.S.C. § 409 may be analogized to the "deliberative process privilege." The purpose behind the two privileges is to assure candor within an administrative agency in reaching its policy decisions. *See Concrete Const. Co. v. U.S. Dept. of Labor,*

748 F. Supp. 562, 567 (S.D. Ohio 1990) and *Nadler v. U.S. Dept. of Justice,* 955 F.2d 1479 (11th Cir. 1992). These purposes are served only if the privilege is limited to documents which are: (1) "pre-decisional," those which are "generated *before* the adoption of an agency policy," and (2) "deliberative," those which "reflect[ ] the give-and-take of the consultative process." *Concrete Const.,* 748 F. Supp. at 566; *Nadler,* 955 F.2d at 1491 (internal citation omitted). In addition, "purely factual material that does not reflect the agency's deliberative process generally is not protected." *Nadler,* 955 F.2d at 1491 (internal citation omitted).

Congress explicitly limited 23 U.S.C. § 409 to those reports (and other documents) generated *before* the decision to upgrade a crossing was made, thereby fostering administrative candor without cloaking the government's or railroad's post-decisional conduct in an impenetrable veil of secrecy or immunity for unsafe conduct.

For these reasons, all material (whether it be "reports, surveys, schedules, lists or data"), and certainly any underlying facts relating to a grade-crossing that are compiled *after* the decision has been made to upgrade the crossing, should be freely discoverable.

CONCLUSION

Certiorari should be denied. There is no real conflict between the Arizona decision and the decisions of the only two Circuit Courts that have addressed this Statute. Moreover, the Arizona decision is interlocutory and does not even address the actual discovery requests. The trial court has not yet ruled on the discoverability or admissibility of the testimony and documents at issue. An interpretation of the scope of 23 U.S.C. § 409 as it applies to the facts in this case is consequently unnecessary and premature.

Respectfully submitted,

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September 25, 1995

APPENDIX A — EXCERPTS OF DISCOVERY REQUESTS AT ISSUE[1]

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

NO. CV 91-19192

NON-UNIFORM INTERROGATORIES
(First Set)

AND ANSWERS

TO: Defendant Southern Pacific Transportation Company

Under authority of Rule 33, Arizona Rules of Civil Procedure, the plaintiff(s) hereby request(s) that the defendant Southern Pacific Transportation Company answer in writing and under oath, within forty-five (45) days from the receipt hereof, the following interrogatories

INSTRUCTIONS FOR USE IN ANSWERING INTERROGATORIES

A. All information is to be divulged which is in the possession, custody or control of each individual or corporate party, their attorneys, investigators, agents, employees or other representatives, including all information reasonably available to them.

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1. For brevity's sake, the captions and mailing lists will not be reproduced. The interrogatories and answers (where given) will be reproduced. Answers will be italicized.

Appendix A

668. State the maximum speed limit for freight trains at this crossing allowed on April 10, 1990 by:

a. Maricopa County.

Not applicable.

b. City of Chandler.

Not applicable.

c. State of Arizona.

Not applicable.

d. Federal Government.

Not applicable.

669. State the maximum speed limit for trains at this crossing allowed by Southern Pacific on April 10, 1990.

25 miles per hour.

670. State the date that this grade crossing first appeared on the Arizona Corporation Commission's Array for safety improvement by the installation of gates.

Objection. Privileged under 28 U.S.C. § 409 and not relevant to the subject matter of the pending action or reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Southern Pacific Transportation Company does not independently maintain copies of previous crossing arrays.

Appendix A

Plaintiff can and should obtain this information from the Arizona Corporation Commission.

671. Was there ever a field review at this grade crossing? ____ If so, state:

Please refer to answer and objection to interrogatory number 670.

a. Each date on which it was held.

b. The name of each person who was present and on whose behalf each attended (e.g., City, State, County, Railroad).

672. Was a project ever begun to improve this grade crossing by the installation of automatic gates? ____ If so, state:

a. The project number.

Objection. The information is privileged under 23 U.S.C. § 409 and is not relevant to the subject matter of the pending action or reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Southern Pacific Transportation Company produces herewith GMO file No. 69398.

b. Each proposed improvement and the party responsible for installing each improvement at this crossing.

c. The date the project was to begin.

d. The date the engineering plans for the project were

Appendix A

e. The name and employer of each engineer who drafted the plans and the name of each entity with whom the engineer contracted.

f. The date the plans were approved.

g. The name of each person and employer who approved the plans.

673. State:

a. The date Southern Pacific first estimated the total cost of improving this crossing by installing automatic gates.

Please refer to answer and objection to interrogatory number 672.

b. The estimated cost.

c. The name of each party who it was contemplated would pay for any part of the cost of improvement and the part each would pay.

d. The name of each party who it was contemplated would reimburse any part of the cost of improvement.

e. The proportionate share of each reimbursed party.

674. Did the Corporation Commission order that this crossing be improved? ____ If so, state:

a. The improvements ordered.

Appendix A

Please refer to answer and objection to interrogatory number 672.

b. Each party who was ordered to make each improvement.

c. The date of the order.

d. The name of each party who was to pay for the improvements and the proportionate share.

e. The total cost of the improvements.

675. Were automatic gates and/or cantilevered flashing lights installed at this crossing on or before April 10, 1990? ____ If not, state in detail each reason why you contend they were not installed and the name of each person or entity you contend was responsible for the failure to install the gates and cantilevered lights.

Please refer to answer and objection to interrogatory number 672.

676. Do you contend that if automatic gates had been installed before April 10, 1990, they probably would not have reduced the likelihood of this collision? ____ If not, state:

a. Each and every reason why you so contend.

Objection. Information is privileged under 23 U.S.C. § 409, is not relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence and calls for speculation. Without waiving this objection, however, Southern Pacific Transportation Company

believes, given Richard Isbell's failure to take due care for his own safety and the safety of others and his failure to heed the numerous audible and visual warnings of the existence of the crossing and the approach of the oncoming train, it is not likely that additional visual warnings would have reduced the likelihood of this collision.

b. The name and address of each person who will testify in support of your contention.

Please refer to answer to interrogatory number 609.

677. Do you contend that it was not feasible or practical from an economic or engineering standpoint for the Southern Pacific Transportation Company to have installed automatic gates at this grade crossing on or before April 10, 1990? ____ If so, state:

a. Each and every reason you so contend.

Objection. The information sought is privileged under 23 U.S.C. § 409, is not relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence, installation of warning devices at grade crossings in Arizona is governed by Arizona state law, and question is unintelligible (terms "feasible" or "practical" are not defined).

b. Each and every fact upon which you base your contention.

c. The name and last known address of each and every witness who will testify in support of your contention.

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678. State the maximum train speed authorized by Southern Pacific for freight trains at this grade crossing in:

a. 1985

25 mph

b. 1986

25 mph

c. 1987

25 mph

d. 1988

25 mph

e. 1989

25 mph

f. 1990

25 mph

679. Was a field review of this crossing attended by representatives of the Southern Pacific Transportation Company? ____ If so, state:

a. The name and last known address of each representative.

Please refer to objection and answer to interrogatory number 671.

b. The date of the field review.

c. Whether any of your representatives made a written record or report of findings or recommendations.

d. The author and date of each such report or record.

680. Do you contend that after public hearing and a finding that this grade crossing was sufficiently hazardous, the Arizona Corporation Commission did not have the legal authority to require that Southern Pacific install automatic gates at this grade crossing before April 10, 1990? ____ If you so contend, state why the Arizona Corporation Commission did not have such authority.

Please refer to objection to interrogatory number 677.

681. Do you contend that without an order from the Arizona Corporation Commission, Southern Pacific could not have installed automatic gates at this grade crossing before April 10, 1990? ____ If so, state:

a. Each and every reason you so contend.

Please refer to objection to interrogatory number 677.

b. Each and every fact upon which you base your contention.

c. The name and last known address of each and every witness who will testify in support of your contention.

682. Do you contend that unless and until it has been order by the Arizona Corporation Commission to do so, the Southern

Appendix A

Pacific Transportation Company had never installed automatic gates at any grade crossing before April 10, 1990? ____ If so, state:

a. Each and every reason you so contend.

Please refer to objection to interrogatory number 677.

b. Each and every fact upon which you base your contention.

c. The name and last known address of each and every witness who will testify in support of your contention.

683. State the date of each and every meeting between representatives of Southern Pacific and/or Maricopa County and/or the City of Chandler and/or the State of Arizona (whether others were present or not) after January 1, 1974 and prior to April 10, 1990 regarding the condition or improvement of this grade crossing.

Please refer to objection and answer to interrogatory number 672.

684. State the date, author and addressee of each and every letter in your possession to or from Southern Pacific regarding, this grade crossing on or before April 10, 1990. [In lieu of the above, you may simply produce each letter.]

Please refer to objection and answer to interrogatory number 672. Question is overbroad in scope and time.

685. State the date, author and addressee of each and every

letter in your possession to or from Southern Pacific regarding this grade crossing since April 10, 1990. [In lieu of the above, you may simply produce each letter.]

Please refer to objection and answer to interrogatory number 684.

686. Did Southern Pacific contest or object to the need for improvement of this grade crossing by the installation of automatic gates and/or other warning devices before April 10, 1990? ____ If so, state:

a. The date of each contest or objection.

Please refer to objection to interrogatory number 677.

b. The name of the person who made it.

c. The name and last known address of the person to whom it was made.

d. Whether it was made in writing or orally.

687. Were automatic gates ever installed at this grade crossing? ____ If so, state:

a. The entity that ordered the installation and the date ordered.

Please refer to objection and answer to interrogatory number 672.

b. The entity that was ordered to install them.

c. The entity that installed them.

d. The date of each installation.

* * *

Arizona Corporation Commission? ____ If so:

a. Identify each such crossing.

Objection. Please refer to objection set forth in interrogatory number 677. Without waiving this objection, to the best of Southern Pacific Transportation Company's knowledge, no gates have been installed at any public grade crossing within the State of Arizona without the approval of the Arizona Corporation Commission within the period indicated.

b. The date of installation.

698. Did Southern Pacific between January 1, 1985 and April 10, 1990 inclusive, have any written criteria for determining whether a particular grade crossing in Arizona was sufficiently hazardous so that Southern Pacific would install, or recommend the installation of automatic gates in the interest of public safety? ____ If so, identify:

a. Each such writing.

Objection. Please refer to objection to interrogatory number 672. Without waving this objection, Southern Pacific Transportation Company has no such criteria, although Southern Pacific Transportation Company follows certain recommended practices of the Manual on Uniform Traffic

Appendix A

Control Devices and similar publications regarding the actual installation of grade crossing warning devices.

b. The name of the person in charge of the department at Southern Pacific responsible for making that determination.

699. Did Southern Pacific, between January 1, 1985 and April 10, 1990 inclusive, ever determine that a particular grade crossing in Arizona was sufficiently hazardous so as to install, or recommend the installation of, automatic gates in the interest of public safety? ____ If so, identify:

a. The location of each such crossing.

Please refer to answer and objection to interrogatories number 672 and 698.

b. The name and address of each person responsible for making that determination.

700. Did Southern Pacific, between January 1, 1985 and April 10, 1990 have a Department, Division and/or person with the responsibility of inspecting grade crossings in the Chandler area to determine if in need of installation of automatic gates? ____ If so, state:

a. The name of each Department or Division.

Objection. Decisions regarding the installation of automatic gates are made by the local governmental agencies involved and by the Arizona Corporation Commission and not by Southern Pacific Transportation Company. See page 54(a).

b. The name and title of each person with that responsibility.

701. Did Southern Pacific, between January 1, 1985 and April 10, 1990 have a Department, Division and/or person with the responsibility of inspecting grade crossings in the Chandler area to determine if they were reasonably safe for vehicular traffic? ____ If so, state:

a. The name of each Department or Division.

Please refer to answer and objection to interrogatory number 700.

b. The name and title of each person with that responsibility.

* * *

704. Did the Southern Pacific Transportation Company do the construction work at the Chandler Heights Road public grade crossing in 1990 or did it have a general contractor do it?

Objection. "Construction work" is not defined. Please refer also to objection to interrogatory number 672. Without waiving this objection, actual installation work was performed by Southern Pacific.

* * *

706. State each and every reason why you contend that construction for the installation of automatic gates and warning devices ordered by the Corporation Commission on January 22, 1986 was not begun until June 22, 1990.

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Objection. Please refer to objection to interrogatory number 672.

707. State the date that construction started at the Chandler Heights Road public grade crossing for the installation of automatic gates and other warning devices ordered installed by the Arizona Corporation Commission on January 22, 1986.

Approximately July 24, 1990.

* * *

709. State the date of completion of construction for the installation of automatic gates and other warning devices ordered installed by the Arizona Corporation Commission on January 22, 1986.

Objection. Please refer to objection to interrogatory number 672. Without waiving this objection, gates were placed in service on approximately October 8, 1990.

710. State the date that the automatic gates and other warning devices ordered installed by the Arizona Corporation Commission on January 22, 1986 were actually installed.

Please refer to objection and answer to interrogatory number 709.

711. State the date that the automatic gates and other warning devices ordered installed by the Arizona Corporation Commission on January 22, 1986 were made operational.

Please refer to objection and answer to interrogatory number 709.

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712. State (or provide an itemization of) the total actual costs to install the grade crossing warning system ordered by the Arizona Corporation Commission in January, 1986, and itemize the cost of equipment or material, labor and other costs.

Unknown at this time. Some information is in the GMO file produced concurrently herewith.

713. State the name and last known address of each person at Southern Pacific Transportation Company whose duties included the responsibility to see that the Arizona Corporation Commission's order of January 22, 1986 was complied with Bob Prince, Southern Pacific Transportation Company, Monterey Park, California.

DATED this 5th day of August, 1991.

* * *

Appendix A

VERIFICATION

STATE OF ARIZONA)
)
County of Maricopa)

Erwin Owens, being first duly sworn, upon deposes and says: That he is a claims representative of Southern Pacific Transportation Company, defendant herein; that he has read the foregoing answers to non-uniform interrogatories; knows the contents thereof; and that the same are true, except those answered upon information and belief, and as to those, he believes them to be true.

s/ Erwin Owens
Erwin Owens

SUBSCRIBED AND SWORN to before me this 22nd day of October, 1991, by Erwin Owens.

s/ Shirley D. Crozier
Notary Public

My commission expires:
8-8-92

Appendix A

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

NO. CV 91-19192

NON-UNIFORM
INTERROGATORIES
(3rd Set)

AND ANSWERS

* * *

TO: Defendant Southern Pacific Transportation Company

Under authority of Rule 33, Arizona Rules of Civil Procedure, the plaintiffs hereby request that the defendant Southern Pacific Transportation Company answer in writing and under oath, within thirty (30) days from the receipt hereof, the following interrogatories:

714. State the number of grade crossings in Arizona as of January 22, 1986 at which the Arizona Corporation Commission had entered an order granting a governmental entity authority to have the Southern Pacific Transportation Company install automatic gates but at which the gates had not yet been installed.

The information is privileged under 23 U.S.C. § 409 and is not relevant to the subject matter of the pending action or reasonably

calculated to lead to the discovery of admissible evidence. The interrogatory is, in addition, overbroad.

715. For each grade crossing referred to in answer to Non-Uniform Interrogatory No. 714, state:

a. The date of the Corporation Commission Order

OBJECTION. See objection to interrogatory number 714, above.

b. The location of the grade crossing.

c. The date the gates were operational.

d. Whether the cost of installation was paid for in part by federal funds.

716. State the number of grade crossings in Arizona as of January 22, 1986 at which the Arizona Corporation Commission had ordered the Southern Pacific Transportation Company install automatic gates but at which the gates had not yet been installed.

OBJECTION. See objection to interrogatory number 714, above.

717. For each grade crossing referred to in answer to Non-Uniform Interrogatory No. 716, state:

a. The date of the Corporation Commission Order

OBJECTION. See objection to interrogatory number 714, above.

b. The location of the grade crossing.

c. The date the gates were operational.

d. Whether the cost of installation was paid for in part by federal funds.

718. State the number of grade crossings referred to in Non-Uniform Interrogatory No. 714 at which the Southern Pacific Transportation Company had installed the automatic gates as of April 10, 1990.

OBJECTION. See objection to interrogatory number 714, above.

719. State the number of grade crossings referred to in Non-Uniform Interrogatory No. 716 at which the Southern Pacific Transportation Company had installed the automatic gates as of April 10, 1990.

OBJECTION. See objection to interrogatory number 714, above.

720. State the location of each grade crossing in Arizona at which the Arizona Corporation Commission had given a governmental entity authority to have Southern Pacific install automatic gates but at which the gates had not yet been installed as of April 10, 1990.

OBJECTION. See objection to interrogatory number 714, above.

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721. For each location identified in the preceding interrogatory, state:

a. The date of the order.

b. The date the gates were made operational.

c. Whether the installation was paid for in part by federal funds.

722. State the location of each grade crossing in Arizona at which the Arizona Corporation Commission had ordered the Southern Pacific install automatic gates but at which the gates had not yet been installed as of April 10, 1990.

OBJECTION. See objection to interrogatory number 714, above.

723. For each location identified in the preceding interrogatory, state:

a. The date of the order.

b. The date the gates were made operational.

c. Whether the installation was paid for in part by federal funds.

724. Has the Corporation Commission granted authority to a governmental entity to have the Southern Pacific Transportation Company install, or has it ordered the Southern Pacific Transportation Company to install, automatic gates at any grade crossing in Arizona since January 22, 1986? If so, state:

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a. The number of such crossings.

OBJECTION. See objection to interrogatory number 714, above.

b. The location of each crossing.

c. The date of the Order.

d. The date of installation.

e. Whether the installation was paid for by federal funds.

DATED this 11th day of May, 1992.

* * *

Appendix A

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

NO. CV 91-19192

NON-UNIFORM
INTERROGATORIES
(4th Set)

* * *

TO: Defendant State of Arizona

Under authority of Rule 33, Arizona Rules of Civil Procedure, the plaintiffs hereby request that the defendant State of Arizona answer in writing and under oath, within thirty (30) days from the receipt hereof, the following interrogatories:

684. State the number of grade crossings in the State of Arizona as of February 2, 1983.

685. State the number of grade crossings in the State of Arizona as of February 2, 1983 with no active warning device (i.e. those with crossbucks only).

686. State the number of grade crossings in the State of Arizona as of February 2, 1983 with flashing lights but no automatic gates.

687. State the number of grade crossings in the State of

Arizona as of February 2, 1983 with wig-wag signals but no gates.

688. State the number of grade crossings in the State of Arizona as of February 2, 1983 with automatic gates.

689. State the number of grade crossings in the State of Arizona as of February 2, 1983 with gates that were not automatic.

690. State the number of grade crossings in the State of Arizona as of April 10, 1990.

691. State the number of grade crossings in the State of Arizona as of April 10, 1990 with no active warning device (i.e. with crossbucks only).

692. State the number of grade crossings in the State of Arizona as of April 10, 1990 with flashing lights but not automatic gates.

693. State the number of grade crossings in the State of Arizona as of April 10, 1990 with wig-wag signals but no gates.

694. State the number of grade crossings in the State of Arizona as of April 10, 1990 with automatic gates.

695. State the number of grade crossings in the State of Arizona as of April 10, 1990 with gates that were not automatic.

696. State the location of each grade crossing in the State of Arizona at which automatic gates had not yet been installed as of April 10, 1990 but for which the Corporation Commission had

already entered an order either granting authority for the installation and/or ordering the gates be installed.

697. For each location identified in the preceding interrogatory, state:

a. The name of the railroad that was to install the automatic gates.

b. The date of the Corporation Commission Order.

c. The date the gates were made operational.

d. Whether the installation was paid for in part by federal funds.

698. State the location of each grade crossing in the State of Arizona at which flashing lights had not yet been installed as of April 10, 1990 but for which the Corporation Commission had already entered an order either granting authority for the installation of flashing lights only (no gates) and/or ordering the lights be installed.

699. For each location identified in the preceding interrogatory, state:

a. The name of the railroad that was to install the flashing lights.

b. The date of the Order.

c. The date the flashing lights were made operational.

d. Whether the installation was paid for in part by federal funds.

700. Has the Corporation Commission granted authority to install, or ordered the installation of only flashing lights (without gates) at any grade crossing in Arizona since January 22, 1986? ____ If so, state:

a. The number of such crossings.

b. The location of each crossing.

c. The date of the Order.

d. The date of installation.

e. The name of the railroad that was to, or did, make the installation.

f. Whether the installation was paid for out of federal funds.

701. Has the Corporation Commission granted authority to install, or ordered the installation of, automatic gates at any grade crossing in Arizona since January 22, 1986? ____ If so, state:

a. The number of such crossings.

b. The location of each crossing.

c. The date of the Order.

d. The date of installation.

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e. The name of the railroad who was to, or did, make the installation.

f. Whether the installation was paid for out of federal funds.

DATED this 11th day of May, 1992.

* * *

Appendix A

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

NO. CV 91-19192

THIRD REQUEST FOR
PRODUCTION OF
DOCUMENTS

* * *

TO: Defendant State of Arizona

COMES NOW the plaintiffs, by and through counsel undersigned, and pursuant to Rule 34 of the Arizona Rules of Civil Procedure hereby request that the defendant State of Arizona produce and permit plaintiffs to inspect and/or copy the following designated items within thirty (30) days from the date of service.

1. Any and all orders referred to in Non-Uniform Interrogatory No. 696.

2. Any and all orders referred to in Non-Uniform Interrogatory No. 698.

3. Any and all orders referred to in Non-Uniform Interrogatory No. 700.

Appendix A

4. Any and all orders referred to in Non-Uniform Interrogatory No. 701.

DATED this 11th day of May, 1992.

* * *